No. 21,931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL TELEPHONE COMPANY OF CALIFORNIA, a corporation

Appellant,

vs.

COMMUNICATION WORKERS OF AMERICA, an unincorporated association,

Appellee.

APPELLANT'S OPENING BRIEF

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TABLE OF AUTHORITIES CITED

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PRELIMINARY STATEMENT

This is an appeal by General Telephone Company of California (hereinafter referred to as "Company") from a judgment of the United States District Court for the Central District of California which ordered Company to arbitrate the issue of whether Robert L. Cherney, a salaried supervisor at the time of discharge, was discharged by Company for just cause.

Communications Workers of America (hereinafter referred to as "Union") initiated the action in the District Court by filing a petition against Company to compel arbitration pursuant to the Labor-Management Relations Act, 1947, 29 U.S.C. § 185. The District Court found that the dispute fell within the arbitration provisions of the collective bargaining agreement between Company and Union and ordered Company to submit to arbitration.

JURISDICTION

The jurisdiction of the District Court arose under the Labor-Management Relations Act, 1947, 29 U.S.C. § 185. Jurisdiction of this Court to review the judgment exists under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

1. Statement of Facts.

Union and Company entered into a written collective bargaining agreement (hereinafter referred to as "Agreement") which became effective March 15, 1964. (R. 6.)[1] In the Agreement, Company agreed to recognize Union as "the collective bargaining agent for all of its wage-earning employees during the life of" the Agreement. (R. 6, at p. 9.) "Wage-earning employees" is defined in the Agreement as follows:

> ". . . all those persons on the payroll of the Company whose remuneration is expressed in the form of hourly wages." *Id.*

Robert L. Cherney was discharged by Company on February 4, 1965. At the time of his discharge, he was a salaried supervisor and not a wage-earning employee as defined above. He had been a supervisory employee at all times since August 31, 1964. (R. 27.) Cherney was discharged for alleged misconduct during a strike which ended March 15, 1964, and for disloyalty to the Company as a supervisor, in that he failed to advise Company that he was subpoenaed by Union to be its witness in an arbitration case involving the discharge of a wage-earning employee and failed to voluntarily advise Company of the

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[1]"R." refers to the Transcript of Record (June 20, 1967), consisting of 15 pleadings and documents paginated consecutively. "Tr." refers to the Reporter's Transcript of Proceedings in the District Court (May 16, 1966).

information he had concerning the aforementioned arbitration case. (R. 27, 28.)

Company refused to accept a Union grievance protesting Cherney's discharge on the ground that it was not obligated by the Agreement to entertain a grievance protesting or questioning the discharge of a supervisory employee. Company refused to submit to arbitration on the same ground. (R. 28.)

Thereafter, the Union initiated an action in the District Court to compel Company to arbitrate the question of whether Cherney was discharged for just cause.

At trial, Company contended that it could not be compelled to arbitrate the discharge of a salaried supervisor pursuant to the arbitration provisions of a collective bargaining agreement which expressly applies only to Company's wage-earning employees. Union agreed that Cherney was a salaried supervisor at the time of his discharge and conceded that he had not been promoted to the supervisory position as a sham or pretext to discharge him for conduct while a wage-earning employee. (Tr. 18.) Nevertheless, the Union argued that if arbitration of the discharge were not compelled, Company would have a license in the future to promote employees to supervisory positions in order to discharge them without their having recourse to arbitration.

The District Court found that Cherney was a supervisor at the time he was discharged. Nevertheless it further found that the dispute fell within the arbitration provisions of the Agreement and ordered Company to submit to arbitration.

2. Question Presented.

The question presented by this appeal is whether the District Court erred in compelling Company to arbitrate

the discharge of an employee who was a salaried supervisor at the time of his discharge pursuant to a collective bargaining agreement which applies solely to wage-earning employees.

ARGUMENT

I. COMPANY CANNOT BE COMPELLED TO ARBITRATE ANY DISPUTE WHICH IT HAS NOT AGREED TO ARBITRATE.

In *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), the Supreme Court of the United States held that a duty to submit to arbitration can arise only from a contractual obligation to do so:

> "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

See also, *Atkinson v. Sinclair Refining Co.*, 370 U.S 238, 241 (1962); *Procter & Gamble Independent Union v. Procter & Gamble Mfg. Co.*, 312 F.2d 181, 185-86 (2d Cir. 1962), *cert. denied*, 374 U.S. 830 (1963).

The Supreme Court has also held that it is the function of the courts to determine whether an employer has agreed to submit a particular dispute to arbitration:

> "Under our decisions whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties." *Atkinson v. Sinclair Refining Co., supra,* at 241.

> "The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty."

John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964).

See also, *Timken Roller Bearing Co. v. NLRB,* 325 F.2d 746, 754 (6th Cir. 1963), *cert. denied,* 376 U.S. 971 (1964); *Las Vegas Local Joint Executive Bd. of Culinary Workers v. Las Vegas Hacienda, Inc.,* 56 L.C. ¶ 12, 197 (9th Cir. 1967).

Union will doubtless argue that, since the "Trilogy" decisions,[2] federal courts are required to liberally construe collective bargaining agreements in such a way as to favor arbitration. Such an argument begs the question presented in this case, however, for if a reasonable interpretation of an agreement excludes a particular dispute from arbitration, the employer cannot be compelled to submit to arbitration. For example, in *Boeing Co. v. International Union, UAW,* 370 F.2d 969 (3d Cir. 1967), the union emphasized to the Court the federal policy favoring arbitration in its attempt to compel an employer to submit to arbitration. The Court acknowledged the policy, but held that it could not be relied upon to override established principles of contract interpretation:

> "Despite this liberal rule of construction a reluctant party may not be compelled to submit a controversy to arbitration unless under a fair construction of the agreement he is bound to do so." *Id.* at 970.

Similarly, in *Retail Clerks International Ass'n. v. Lion Dry Goods, Inc.,* 341 F.2d 715, 720 (6th Cir.), *cert. denied,* 382, U.S. 839 (1965), the Court stated:

> "A national policy favoring arbitration does not authorize arbitration unless the contract so provides."

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[2]*United Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

See generally, Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich.L.Rev. 751, 759, 789-91 (1965).

Thus, unless under a fair construction of the collective bargaining agreement Company has agreed to arbitrate the discharge of Cherney, Union has no right to compel arbitration.

II. THE COLLECTIVE BARGAINING AGREEMENT DOES NOT OBLIGATE COMPANY TO ARBITRATE THE DISCHARGE OF AN EMPLOYEE WHO WAS NOT A WAGE-EARNING EMPLOYEE AT THE TIME OF HIS DISCHARGE.

A. It Is Clear That Neither The Collective Bargaining Agreement Between Company And Union Nor The Arbitration Provisions Contained Therein Apply To Salaried Supervisory Employees.

In this case, Union seeks to compel Company to arbitrate the question of whether an employee who was a salaried supervisor at the time of his discharge was discharged for "just cause." (R. 43, 44.) In order to determine whether the Company is obligated to arbitrate the discharge, it is necessary to examine the collective bargaining agreement entered into by Company and Union which sets forth the wages, hours, and working conditions of those employees of Company represented by Union.

The first provision of the Agreement, in which Company recognizes Union as collective bargaining agent, defines the scope and coverage of the Agreement:

> "The terms and conditions of this Agreement shall apply to all wage-earning employees of the Company. . . ." (R. 6, at 9.)

That provision also defines "wage-earning employees" as "all those persons on the payroll of the Company whose remuneration is expressed in the form of hourly wages." (Id.)[3]

Except for the recognition clause, Article VI (Definition), and one reference in Article VII,[4] the phrase "wage-earning employees" does not appear in the Agreement. The remainder of the Agreement refers only to "employees." For example, Article X (Discharges and Suspensions) provides that:

> "Employees covered by this Agreement shall not be suspended or discharged except for just cause...." (R. 6, at 19.)

Article XII (Grievance Procedure) states:

> "The term 'grievance' as used in this Contract shall mean any grievance made either by an indi-

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[3]The same definition of wage-earning employees appears in Article VI (Definitions):

> *"Wage Earning Employees* — shall mean all persons on the Company's payroll whose remuneration is expressed in the form of hourly wages." (R. 6, at 14.)

[4]Article VII (Contracting of Work) limits the number of employees of independent contractors to 3% of the number of Company's "wage-earning employees." Provisions of the Agreement dealing with persons covered by the Agreement speak in terms of "employees." Article VII, however, is not concerned with persons covered by the Agreement. It merely designates a class of persons, the number within which is multiplied by 3% to set the limit on the number of employees of independent contractors. Although the class of persons covered by the Agreement and the class multiplied by 3% happen to be the same, the difference in context requires that the class be precisely defined in the latter instance.

vidual employee or group of employees. . . ." (R. 6, at 21.)[5]

It is manifestly clear that the word "employees" refers to "wage-earning employees." Having defined the class of persons to which the Agreement is to apply in the recognition clause, there is no reason to define the class in detail every time it is referred to thereafter. "Employees" is merely a shorthand expression for "wage-earning employees." This construction of the Agreement is in accord with the familiar canon of construction:

> "...general words in any contract relating to a particular subject shall be interpreted as meaning things of the same kind as the particular matters referred to." 4 Williston, *Contracts* § 619, at 746 (3d ed. 1961).[6]

The Agreement would make little sense unless "employees" is interpreted to mean only "wage-earning employees," since that is the class of persons on whose behalf Union was recognized as bargaining agent. The judgment of the District Court, if affirmed, would mean

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[5]In its complaint, Union cited a number of clauses of the Agreement in support of its contention that the dispute over the discharge of Cherney involves questions of interpretation and application of the Agreement. (R. 3, 4.) Of the provisions cited, Articles II, V, X, XII, XIII, XVII, XVIII, XXII, XXVII, XXXII and Addendums One, Two and Three speak only of "employees." Article XIV refers to the phrase "salaried employees," but only in the context of employees who have been promoted and then, at some subsequent date, returned to the bargaining unit.

[6]A similar canon of construction is that, "The same words used in different clauses of a contract will be understood to have been used in the same sense." *Willingham v. Life & Casualty Ins. Co.*, 216 F.2d 226, 227 (5th Cir. 1954).

that the agreement which resulted from the bargaining would actually apply to a broader group of employees than those for whom Union bargained.[7] Of course, at the time of bargaining, the expectation of the parties was that only persons in the bargaining unit would be affected by the Agreement. Nothing in the Agreement or otherwise presented to the Court below suggests that the slightest consideration was given to any other class of persons.

The general scheme of the Agreement between Company and Union clearly indicates that the parties contemplated all provisions of the Agreement, including the arbitration provisions, to apply only to wage-earning employees.[8] In a wide variety of cases, the courts have refused to compel arbitration where the general scheme of the collective bargaining agreement in question suggested that the dispute was not intended to be arbitrable. See, *e.g., Boeing Co. v. International Union, UAW,* 370 F.2d 969 (3d Cir. 1967); *Local 998, UAW v. B. & T. Metals Co.,* 315 F.2d 432 (6th Cir. 1963).

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[7]That the arbitration provisions of the Agreement should apply to supervisory personnel is particularly objectionable because it would in effect allow Union to represent a class of persons which is excluded from coverage by the Labor-Management Relations Act, 1947, § 2(3), 29 U.S.C. § 152(3):

> "The term 'employee'... shall not include... any individual employed as a supervisor...."

[8]Indeed, many provisions of the Agreement could not possibly apply to any class of persons other than wage-earning employees. For example, Article XVI (Temporary Assignments) deals with assignments to higher wage-paying classifications (R. 6, at 26); Article XVII (Credited Service) refers to the effective date of wage increases (R. 6, 27); Article XIX (Overtime Hours) computes overtime pay at the rate of one and one-half times the normal hourly rate of pay (R. 6, at 30). None of these provisions could have any application to salaried employees. Moreover, *no* provision of the Agreement deals with the many problems which would be unique to the salaried supervisor.

B. Cherney Was A Salaried Supervisory Employee At The Time Of His Discharge, And, Therefore, The Grievance Arose At A Time When The Collective Bargaining Agreement No Longer Applied.

There is no question that Cherney was a salaried supervisor of the Company at the time of his discharge. Paragraph G of the Pretrial Conference Order agreed to by Company and Union reads as follows:

> "G. On February 4, 1965, Robert L. Cherney was dismissed from the employ of the Company. On February 4, 1965, Cherney was a supervisory employee, and not a wage-earning employee of the Company. Cherney had been a supervisory employee, and not a wage-earning employee, at all times after August 31, 1964." (R. 27.)

The Union may try to bring the discharge of Cherney within the scope of the Agreement by arguing that, if Company is upheld in its position, Company will be able in the future to avoid arbitration by elevating to supervisory positions those "wage-earning employees" whom it wishes to discharge. This argument would involve the implicit suggestion that Cherney may have been promoted by the Company in bad faith in order to discharge him without being required to submit to arbitration. There are no facts present in this case to support an argument that the promotion of Cherney was for such purpose. In fact, in oral argument before the District Court, the Union admitted that it was *not* contending that the Company acted in bad faith with respect to the promotion:

> "First of all, the Union is coming in here representing an employee who at the time of his discharge was a managerial employee. We are not making and

never have made any contention, your Honor, that this was a sham promotion to get to Mr. Cherney. My goodness, we do not make any such contention." (Tr. 18.)

Even assuming *arguendo* that the promotion of Cherney was a sham or pretext to discharge him for alleged conduct during the time he was a wage-earning employee, there would still be no arbitrable issue. The Agreement applies solely to wage-earning employees. During the next collective bargaining negotiations, the Union can appropriately argue that there should be a provision for arbitrating discharges of salaried supervisors who were allegedly promoted in bad faith. But the Union should not be permitted to obtain through the arbitration process some concession or advantage that it did not win at the bargaining table.

> "The union also argues that if the company is not compelled to arbitrate this grievance it will be able to exercise almost unlimited discretion over the operation of matters arising under an entire section of the agreement. This argument does not impress. We cannot bring ourselves to accept this invitation to ignore the plain meaning of the Section 9.08 exclusionary clause, and to find ambiguity where none exists. . . . If, at the bargaining table, the union's true intent was to reserve a different sort of Section 9.08 question for an arbitrator, it should not have consented to the incorporation into that section of an exclusionary clause so broad and sweeping." *Communications Workers of America v. New York Telephone Co.,* 327 F.2d 94, 97 (2d Cir. 1964).

See also, *Black-Clawson Co. v. International Ass'n. of Mach.,* 313 F.2d 179, 186 (2d Cir. 1962).

C. Company Is Not Required To Arbitrate The Discharge Of A Salaried Supervisor Even If The Discharge Was Based Upon Acts Committed While The Employee Was A Wage-Earning Employee.

The critical issue in this case, in the words of the Union, is "the right of the Company to discharge a supervisory employee for *alleged* acts committed by said supervisory employee while a wage-earning employee of the Company and represented by the Union." (R. 44.)[9] The District Court may have been influenced by this contention and compelled arbitration based on an erroneous conclusion that there was a factual issue for the arbitrator to decide, *viz.*, whether Cherney actually committed certain acts during the time he was a wage-earning employee. That is not the issue, however. The sole issue is whether Cherney, *at the time of his discharge,* had recourse to the grievance and arbitration provisions of the Agreement. Company submits that he did not and that the District Court erred in interpreting the Agreement to find any duty on Company's part to arbitrate whether or not Cherney was discharged for just cause. The Agreement provides that "Employees *covered by this Agreement* shall not be suspended or discharged except for just cause. . . ." (R. 6, at 19) It does not provide that "employees who were at one time covered by this Agreement shall not be . . . discharged except for just cause. . . ." Cherney had no alleged grievance concerning the justification for his discharge *until he was discharged,* and at that time he was no longer covered by the Agreement.

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[9]It should be noted that only one of the reasons given for Cherney's discharge related to acts committed while a wage-earning employee. His discharge was also based on disloyalty to the Company *during the time he was a supervisory employee.* (R. 27, 28.)

In several recent cases, it has been clearly established that, in determining the applicability of a contract under circumstances similar to those in the present case, it is the status of the employee *at the time the alleged grievance arises* which is of crucial importance. In *Boeing Co. v. International Ass'n. of Mach. & Aero Wkrs.,* 381 F.2d 119 (5th Cir. 1967), four employees were discharged for acts occurring *prior* to the effective date of the collective bargaining agreement. The employer argued that it had agreed to arbitrate only disputes arising under the contract, not disputes arising out of acts occurring prior to the contract. The Court held, however, that the only relevant time for judging the applicability of the contract to the discharged employee was *the time the grievance arose.* The grievance arose with the discharge of the employee, which occurred while the contract was in effect. It was immaterial that the acts which led to the discharge occurred prior to the contract:

> ". . . One thing is crystal clear under the new contract. If — and the if is really the heart of the question — the grievance is the suspension and discharge subsequent to the effective date of the new contract, not the Employer's reasons therefor based upon the conduct of September 16, the new contract explicitly calls for grievance machinery and arbitration of layoffs and discharges." *Id.* at 121.

See also, *International Bhd. of Elec. Wrkrs. v. Wadsworth Electric Mfg. Co.,* 240 F.Supp. 292, 293 (E.D.Ky. 1965).

The same principles apply in the instant case. The *Boeing* court emphasized "the neutral character of these principles so that it is sauce for both employer and union alike. . . ." (*Id.* at 123.) The important time in determining whether the contract applies to Cherney is the time at which the grievance arose. And there is no ques-

tion that in the instant case the grievance did not arise until the discharge occurred:

> ". . . The grievance was action of the Employer in terminating the contractual right to present and future employment. It was these actions by the Employer after the new contract became effective that for the first time had any adverse effect upon the four employees." *Id.* at 122.

Thus, the status of Cherney at the time when the acts leading up to the discharge took place is totally irrelevant. The contract applies to Cherney if, and only if, he was a wage-earning employee at the time of the discharge. There is no question that at that time Cherney was a salaried supervisor.

III. THE TERMINATION OF STRIKE AND RETURN TO WORK AGREEMENT DOES NOT OBLIGATE COMPANY TO ARBITRATE THE DISCHARGE OF CHERNEY.

Union may argue that an obligation to arbitrate the discharge of Cherney can be found in the Termination of Strike and Return to Work Agreement, which was submitted to the Court below (R. 17). That argument is plainly without support. The agreement reads, in relevant part:

> "The Company will reinstate striking employees except those who *have been* discharged for cause. The Company will agree to arbitrations with the Union to determine the validity of each discharge for cause, provided the Union requests each such arbitration." (Paragraph 1.)
>
> ". . . The term of this back-to-work Agreement and all provisions covered herein will be six (6) months from the date of the Primary Agreement,

unless specifically designated otherwise within the particular provision covered within this Agreement." (Paragraph 11.)

Thus, the arbitration clause of the Termination of Strike and Return to Work Agreement applied only to employees who had been discharged *during* the strike. The strike ended March 15, 1964, but Cherney was not discharged until February 4, 1965 (R. 27). He was clearly not discharged during the strike.

Moreover, even if the coverage of the agreement were less restricted, the fact that it terminated by its own terms on September 15, 1964, six months after the effective date of the collective bargaining agreement (March 15, 1964) precludes any possibility that it could be relied upon as a basis for compelling arbitration of the February 4, 1965, discharge of Cherney.

CONCLUSION

It is the role of this Court to review decisions of law made by the District Courts. See, *e.g., Republic Pictures v. Rogers,* 213 F.2d 662 (9th Cir.), *cert. denied,* 348 U.S. 858 (1954); *Brown v. Cowden Livestock Co.,* 187 F.2d 1015 (9th Cir. 1951). The issue of law involved in the present case is whether the Company has agreed to arbitrate the discharge of an employee who was a salaried supervisor at the time of his discharge.

It is well settled that the question of whether an issue is arbitrable under a collective bargaining agreement is a matter of law for the courts to decide, rather than a matter of fact to be left to the arbitrator. See, *e.g., Local 998, UAW v. B. & T. Metals Co.,* 315 F.2d 432, 436 (6th Cir. 1963).

The District Court ordered defendant to arbitrate the discharge of a salaried employee in spite of the fact that

the collective bargaining agreement upon which arbitration is based applies only to wage-earning employees. This order is either based upon an incorrect interpretation of the collective bargaining agreement or ignores the collective bargaining agreement and is contrary to the established principle that a duty to arbitrate any dispute can arise solely from a contractual obligation to arbitrate that dispute. The decision is erroneous and should be reversed with costs on appeal to defendant.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD C. WHITE